

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

GOLO, LLC,

Plaintiff,

vs.

ZOCO PRODUCTIONS, LLC; MEHMET OZ,
M.D.; and KERI GLASSMAN,

Defendants.

:
:
:
: NO. 1:17-cv-08461-KBF (ECF CASE)
:
:
:
:
:
:
:

**DECLARATION OF M. KELLY TILLERY IN SUPPORT OF PLAINTIFF
GOLO, LLC’S MEMORANDUM IN OPPOSITION TO ZOCO DEFENDANTS’
FIRST MOTION FOR SUMMARY JUDGMENT**

Under penalty of perjury, I, M. Kelly Tillery, hereby declare as follows:

1. I am a partner in the law firm of Pepper Hamilton LLP, and am lead counsel of record for Plaintiff GOLO, LLC (“GOLO”) in the above-captioned matter. I submit this Declaration in support of GOLO’s Memorandum in Opposition to ZoCo Defendants’ First Motion for Summary Judgment. The facts stated below are true to my own personal knowledge and, if called to testify, I could and would testify competently thereto.

ZOCO DEFENDANTS’ MOTION IS PREMATURE

2. As the Court is aware, discovery is ongoing in this matter. Fact and expert discovery are scheduled to close on July 31 and September 24, 2018 respectively.

3. While GOLO has diligently sought discovery (including taking nine depositions to date and serving multiple sets of written discovery), it is also still working to depose a key witness – namely, Silvana Marmolejos. Ms. Marmolejos is a former ZoCo Associate Producer who was apparently the *only* person affiliated with *The Dr. Oz Show* (other than the “tester” of the other diet, Rhenotha Whitaker) to communicate directly with GOLO diet

“tester” Celest Oates before filming. GOLO has attempted to serve Ms. Marmolejos at her publicly listed addresses in both Miami, Florida and Secaucus, New Jersey, but has so far been unsuccessful completing good service. GOLO anticipates that it will complete service upon Ms. Marmolejos in short order, despite her New York City-based employment counsel’s refusal to accept service on her behalf.

4. ZoCo Defendants had *only* produced 730 documents in discovery as of April 17, 2018, the date they filed their “First” Motion for Summary Judgment.

5. Two weeks after that filing, on the evening of May 1, 2018, ZoCo Defendants more than tripled their prior productions in the case by producing more than 2,000 documents (comprising more than 12,000 pages) and 46 DVDs containing videos of episodes of *The Dr. Oz Show*. In the days and weeks preceding that document production, ZoCo Defendants did not inform GOLO that any such production was imminent, or otherwise describe what that production contained.

6. That same evening, ZoCo Defendants made an additional *five* third-party productions (comprising another 11,757 pages) available to all sides via their ShareFile site.

7. Because of other obligations, including responding to both ZoCo Defendants’ and Keri Glassman’s pending “First” Motions for Summary Judgment, GOLO has not yet had a chance to perform detailed reviews of all of those documents and videos produced on May 1.

8. However, it appears that ZoCo Defendants *still* have not produced any documents detailing the amounts and sources of revenues they earned in recent years, despite requests and interrogatories for the same. GOLO requested such documents for ZoCo and Dr. Oz (as well as Oz Media, LLC) in its Second Set of Requests for Production of Documents, but

ZoCo Defendants claimed not to have any “such documents to produce”

See

Exhibit A, hereto. Thus, GOLO served a First Set of Interrogatories on ZoCo Defendants which asked about those revenues. On May 13, 2018, ZoCo Defendants’ responded to those Interrogatories by stating that ZoCo “does not earn any income or revenue”

and that Dr. Oz does not earn any dividends, distributions, or salary from ZoCo. *See* **Exhibit B**, hereto.

9. The amounts and sources of money that flow through ZoCo Defendants are highly relevant to GOLO’s claims that ZoCo Defendants unfairly compete with GOLO in the diet and weight-loss industry. Thus, GOLO issued subpoenas to Oz Media, LLC and Sony Pictures, Inc., as well as USANA, on May 29, 2018, to gain further information regarding the manner in which ZoCo Defendants’ operation is funded. Again, without that information, GOLO cannot fully respond to ZoCo Defendants’ “commercial speech” argument in their First Motion for Summary Judgment. In addition, because ZoCo Defendants have only provided very limited information regarding USANA (its “Trusted Partner”), the above-mentioned subpoena to USANA also seeks information regarding the exact nature of their relationship, and the USANA-related content on *The Dr. Oz Show* and DoctorOz.com. This information will also go directly to the “commercial speech” argument raised by ZoCo Defendants in their First Motion for Summary Judgment. Responses to these third-party subpoenas are currently due June 22, 2018.

10. ZoCo Defendants have also only produced one, single-page document regarding the year-long Great Diet Showdown (the “Showdown”). GOLO maintains that additional documents related to the Showdown are necessary and central to its case, and is

exploring alternative means of efficiently obtaining additional Showdown-related documents. (See, generally, Dkt. No. 80.)

11. Finally, ZoCo Defendants' witnesses have consistently failed to remember much of anything about GOLO, the GOLO Segment, or the GOLO Article, during depositions. Rough calculations show that together, ZoCo Defendants' Katherine Gulinello, Michael Shen, Tom Flaherty, Michele Wasserman, and Ms. Whitaker

12. Meanwhile, GOLO has produced 22,280 documents (comprising at least 49,209 pages – and *ten times* the amount of documents ZoCo Defendants have produced) in this case, and given ZoCo Defendants access to its *entire* customer communication database (which contains another 93,048 documents).¹ In addition, GOLO has served responses to written discovery, including ZoCo's First Set of Interrogatories. ZoCo never followed up on, or asked GOLO to revise, its Answers to Interrogatory Nos. 2, 4 or 6 in that First Set of Interrogatories.

ADDITIONAL EXHIBITS

13. Attached as **Exhibit C** hereto is a true and correct copy of the complete transcript of the June 17, 2014 Hearing Before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science, and Transportation of the United States Senate, titled "Protecting Consumers from False and Deceptive Advertising of Weight-Loss Products."

¹ ZoCo Defendants have also served ten third-party subpoenas seeking documents and testimony from, among others, a federal agency, law firms, research companies, and a South African entity

14. Attached as **Exhibit D** hereto is a true and correct copy of a Class Action Complaint filed in *Woodard v. Labrada, et al.*, Case No. 5:16-cv-00189-JGB-SP (C.D. Cal.).

15. Attached as **Exhibit E** hereto is a true and correct copy of a collection of printouts from the websites <https://www.celebrityspeakersbureau.com/talent/dr-oz/>, <https://www.caa.com/caaspeakers/mehmet-oz-md>, <https://www.bigspeak.com/speakers/mehmet-oz>, <https://www.apbspeakers.com/speaker/mehmet-c-oz/>, all pulled from the same on May 25, 2018.

16. Attached as **Exhibit F** hereto is a true and correct copy of a September 18, 2011 article from Forbes.com titled “Dr. Oz Tries to Be a Scientist,” as pulled from <https://www.forbes.com/sites/stevensalzberg/2011/09/18/dr-oz-tries-to-be-a-scientist/#55047e534520> on May 26, 2018.

17. Attached as **Exhibit G** hereto is a true and correct copy of a September 9, 2011 letter from the FDA to producers of *The Dr. Oz Show*, as pulled from <https://wayback.archive-it.org/7993/20170113101250/http://www.fda.gov/Food/Recalls/OutbreaksEmergencies/SafetyAlertsAdvisories/ucm271630.htm> on May 27, 2018.

18. Attached as **Exhibit H** hereto is a true and correct copy of a September 13, 2011 letter from the FDA to producers of *The Dr. Oz Show*, as pulled from <https://wayback.archive-it.org/7993/20170113101252/http://www.fda.gov/Food/Recalls/OutbreaksEmergencies/SafetyAlertsAdvisories/ucm271632.htm> on May 27, 2018

19. Attached as **Exhibit I** hereto is a true and correct copy of an April 17, 2015 AP news article titled “Physicians Want Dr. Oz Gone from Columbia Medical Faculty,” as pulled from <https://apnews.com/d7737df9c53d407cbcb279155ac9a7c/physicians-want-dr-oz-gone-columbia-medical-faculty> on May 26, 2018.

20. Attached as **Exhibit J** hereto is a true and correct copy of a December 17, 2014 article published in the *British Medical Journal*, titled “Televised Medical Talk Shows – What They Recommend and the Evidence to Support Their Recommendations: A Prospective Observational Study,” as pulled from <https://www.bmj.com/content/349/bmj.g7346> on May 26, 2018.

21. Attached as **Exhibit K** hereto is a true and correct copy of a May 4, 2018 article published by Vox.com, titled “Dr. Oz Is a Quack. Now Trump’s Appointing Him to Be a Health Adviser,” as pulled from <https://www.vox.com/2018/5/4/17318932/dr-oz-trump-council-sports-fitness-nutrition> on May 26, 2018.

22. Attached as **Exhibit L** hereto is a true and correct copy of GOLO’s Second Supplemental Answer to Interrogatory No. 1, with the transmission email, showing that the same was served upon ZoCo Defendants’ and Ms. Glassman’s counsel on April 5, 2018.

23. Attached as **Exhibit M** hereto is a true and correct copy of ZoCo Defendants’ Responses to GOLO’s First Set of Requests for Production of Documents.

24. Attached as **Exhibit N** hereto is a true and correct copy of GOLO’s Supplemental Answer to Interrogatory Nos. 10 and 24, which it served upon ZoCo Defendants’ and Ms. Glassman’s counsel via email on November 10, 2017.

25. Attached as **Exhibit O** hereto is a true and correct copy of a collection of excerpts from the transcript of the January 15, 2018 Deposition of GOLO, LLC’s 30(b)(6) representative, Chris Lundin.

26. Attached as **Exhibit P** hereto is a true and correct copy of a collection of excerpts from the transcript of the November 14, 2017 30(b)(6) Deposition of ZoCo Productions, LLC.

27. Attached as **Exhibit Q** hereto is a true and correct copy of a collection of excerpts from the transcript of the January 16, 2018 Deposition of Keri Glassman.

28. Attached as **Exhibit R** hereto is a true and correct copy of a collection of excerpts from the transcript of the January 18, 2018 Deposition of Katherine Gulinello.

29. Attached as **Exhibit S** hereto is a true and correct copy of a collection of excerpts from the transcript of the February 10, 2018 Deposition of Mehmet Oz, M.D.

30. Attached as **Exhibit T** hereto is a true and correct copy of a collection of excerpts from the transcript of the February 13, 2018 Deposition of Rhenotha Whitaker.

31. Attached as **Exhibit U** hereto is a true and correct copy of a collection of excerpts from the transcript of the February 26, 2018 Deposition of Tom Flaherty, M.D.

32. Attached as **Exhibit V** hereto is a true and correct copy of a collection of excerpts from the transcript of the February 27, 2018 deposition of Celest Oates.

33. Attached as **Exhibit W** hereto is a true and correct copy of a collection of excerpts from the transcript of the April 24, 2018 deposition of Michele Wasserman.

34. Attached as **Exhibit X** hereto is a true and correct copy of a collection of excerpts from the transcript of the April 25, 2018 deposition of Michael Shen.

35. Attached as **Exhibit Y** hereto is a true and correct copy of page 1 of Amazon's "Mehmet C. Oz Page," which lists twelve "Books by Mehmet C. Oz," as pulled from <https://www.amazon.com> on May 26, 2018.

36. Attached as **Exhibit Z** hereto is a true and correct copy of an August 23, 2016 Press Release from Simon & Schuster, titled "Dr. Mehmet Oz to Publish New Book With Scribner," as pulled from <http://about.simonandschuster.biz/news/dr-oz/> on May 27, 2018.

37. Attached as **Exhibit AA** hereto is a true and correct copy of a collection of screenshots of webpages from doctoroz.com: a page titled “Dr. Oz’s Book Corner,” which includes a section titled “Books By Dr. Oz,” which has links to separate webpages for each of those books, as copied from <https://www.doctoroz.com/books> on May 27, 2018; a webpage for Dr. Oz’s book, “You on a Diet,” which includes a “shopping cart” icon which links to the publisher’s website where the referenced book can be purchased for \$8.99, as copied from <https://www.doctoroz.com/book/you-losing-weight> on May 27, 2018; a webpage showing the first page of results when a user clicks the “Diet and Weight Loss” topic at the top of the doctoroz.com page, as copied from <https://www.doctoroz.com/topic/weight-loss> on May 27, 2018; and a webpage that includes a list of *The Dr. Oz Show*’s “trusted partners,” as copied from <https://www.doctoroz.com/trusted-partners> on May 27, 2018.

38. Attached as **Exhibit BB** hereto is a true and correct copy of a collection of the Covers and Tables of Contents for six editions of *Dr. Oz The Good Life* from January – August 2017.

39. Attached as **Exhibit CC** hereto is a true and correct copy of a list of Trademark Applications and Registrations owned by Dr. Oz or one of Dr. Oz’s companies or associates, as collected through Corsearch on April 23, 2018, and a true and correct copy of the Certificate of Registration for U.S. Trademark Reg. No. 4,099,390 (“Dr. Oz”).

40. Attached as **Exhibit DD** hereto is a true and correct copy of a screenshot of a Facebook post dated April 20, 2018 on the Dr. Oz Facebook page, which shares a link to an article on the doctoroz.com website titled “5 Ways to Spring Clean Your Diet,” as copied from <https://www.facebook.com/droz/posts/10151024960449995> on May 27, 2018.

41. Attached as **Exhibit EE** hereto is a true and correct copy of a printout of a webpage from USANA.com that includes various “USANA Diet” products for sale, including Nutrimeal™ “shakes”, as pulled from <https://store.usana.com/webhosting/store?page=page2> on May 26, 2018.

42. Attached as **Exhibit FF** hereto is a true and correct copy of a document regarding *The Dr. Oz Show*’s relationship with USANA, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000171-72 [Confidential].

43. Attached as **Exhibit GG** hereto is a true and correct copy of an August 28, 2016 email from M. Oz to S. Rader, et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000171-72 [Confidential].

44. Attached as **Exhibit HH** hereto is a true and correct copy of a September 18, 2016 email from M. Oz to S. Zimmerman, et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000284 [Confidential].

45. Attached as **Exhibit II** hereto is a true and correct copy of a January 3, 2017 email from K. Gulinello to S. Rader, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000301 [Confidential].

46. Attached as **Exhibit JJ** hereto is a true and correct copy of a February 24, 2017 email with attachment from K. Gulinello to N. Azevado, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000302-19 [Confidential].

47. Attached as **Exhibit KK** hereto is a true and correct copy of a February 24, 2017 email from K. Gulinello to S. Rader, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000320-21 [Confidential].

48. Attached as **Exhibit LL** hereto is a true and correct copy of an April 3, 2017 email from K. Gulinello to T. Flaherty, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000322 [Confidential].

49. Attached as **Exhibit MM** hereto is a true and correct copy of an April 4, 2017 email with attachment from T. Flaherty to K. Gulinello, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000323-28 [Confidential].

50. Attached as **Exhibit NN** hereto is a true and correct copy of an April 4, 2017 email from T. Flaherty to S. Marmolejos et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000329 [Confidential].

51. Attached as **Exhibit OO** hereto is a true and correct copy of an April 4, 2017 email from T. Flaherty to R. Whitaker et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000355-57 [Confidential].

52. Attached as **Exhibit PP** hereto is a true and correct copy of an April 5, 2017 email from T. Flaherty to K. Gulinello et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000422 [Confidential].

53. Attached as **Exhibit QQ** hereto is a true and correct copy of an April 5, 2017 email from T. Flaherty to K. Glassman, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000477 [Confidential].

54. Attached as **Exhibit RR** hereto is a true and correct copy of an April 5, 2017 email with attachments from S. Marmolejos to R. Whitaker, C. Oates, et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000478-93 [Confidential].

55. Attached as **Exhibit SS** hereto is a true and correct copy of an April 7, 2017 email from S. Marmolejos to T. Flaherty et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000722 [Confidential].

56. Attached as **Exhibit TT** hereto is a true and correct copy of a collection of emails, with attachments, sent by R. Whitaker to T. Flaherty, et al. on the afternoon of April 7, 2017, documents produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000723-772 [Confidential].

57. Attached as **Exhibit UU** hereto is a true and correct copy of an April 7, 2017 email without attachments from T. Flaherty to K. Glassman, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.000924-27 [Confidential].

58. Attached as **Exhibit VV** hereto is a true and correct copy of an April 7, 2017 “Art Department Prop Request Form”, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001011-12 [Confidential].

59. Attached as **Exhibit WW** hereto is a true and correct copy of a draft Script for “Segment #1: The Truth About the Latest Internet Diets: What Works?”, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001014-20 [Confidential].

60. Attached as **Exhibit XX** hereto is a true and correct copy an April 7, 2017 email with attachment from T. Flaherty to N. Azevado, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001023-30 [Confidential].

61. Attached as **Exhibit YY** hereto is a true and correct copy draft Script for “Segment #1: The Truth About the Latest Internet Diets: What Works?”, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001138-44 [Confidential].

62. Attached as **Exhibit ZZ** hereto is a true and correct copy of an April 10, 2017 email from S. Marmolejos to T. Flaherty, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001151-53 [Confidential].

63. Attached as **Exhibit AAA** hereto is a true and correct copy of an April 10, 2017 email without attachment from T. Flaherty to Dr. Oz Art, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001192 [Confidential].

64. Attached as **Exhibit BBB** hereto is a true and correct copy of an April 10, 2017 email without attachment from S. Marmolejos to T. Flaherty et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001197-99 [Confidential].

65. Attached as **Exhibit CCC** hereto is a true and correct copy of an April 11, 2017 email with attachment from K. Glassman to T. Flaherty, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001241-46 [Confidential].

66. Attached as **Exhibit DDD** hereto is a true and correct copy of an April 11, 2017 email with attachment from T. Flaherty TO K. Glassman, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001247-51 [Confidential].

67. Attached as **Exhibit EEE** hereto is a true and correct copy of an April 11, 2017 email from T. Flaherty to K. Glassman, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001278-87 [Confidential].

68. Attached as **Exhibit FFF** hereto is a true and correct copy of an April 11, 2017 email from A. Gasparis to T. Flaherty et al., a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001306-07 [Confidential].

69. Attached as **Exhibit GGG** hereto is a true and correct copy of an April 11, 2017 email from T. Flaherty to S. Marmolejos, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001428 [Confidential].

70. Attached as **Exhibit HHH** hereto is a true and correct copy of an April 12, 2017 email from M. Shen to S. Marmolejos et al, a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001460-61 [Confidential].

71. Attached as **Exhibit III** hereto is a true and correct copy of a document titled “USANA IDEAS FOR SEASON 9,” a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.1.001620-21 [Confidential].

72. Attached as **Exhibit JJJ** hereto is a true and correct copy of a printout from the DoctorOz.com website including a screen shot of a video clip for “A Sample GOLO Diet Meal Plan,” a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.2.002808-13.

73. Attached as **Exhibit KKK** hereto is a true and correct copy of a June 12, 2017 presentation titled “The Oz Effect,” a document produced by ZoCo Defendants in this case and Bates-labeled ZoCo.9.003672-92 [Confidential].

74. Attached as **Exhibit LLL** hereto is a true and correct copy of a screenshot showing the GOLO account information for G. Goetz, of ZoCo, a document produced by GOLO in this case and Bates-labeled GOLO049208.

75. Attached as **Exhibit MMM** hereto is a true and correct copy of an April 5, 2017 email from G. Goetz to M. Shen, a document produced by ZoCo in this case and Bates-labeled ZoCo.1.000443 [Confidential].

76. Attached as **Exhibit NNN** hereto is a true and correct copy of an April 11, 2017 email from M. Shen to S. Marmolejos, a document produced by ZoCo in this case and Bates-stamped ZoCo.1.001267 [Confidential].

77. Attached as **Exhibit OOO** hereto is a true and correct copy of an April 11, 2017 email with attachment from S. Marmolejos to M. Shen, a document produced by ZoCo in this case and Bates-stamped ZoCo.1.001314-15 [Confidential].

78. Attached as **Exhibit PPP** hereto is a true and correct copy of an April 5, 2017 email from K. Gulinello to T. Flaherty et al., a document produced by ZoCo in this case and Bates-stamped ZoCo.1.000424-25 [Confidential].

79. Attached as **Exhibit QQQ** hereto is a true and correct copy of a printout of the “Most Nutritious Shop” webpage, as pulled from <https://nutritiouslife.com/shop/> on May 24, 2018.

80. Attached as **Exhibit RRR** hereto is a true and correct copy of a website analytics report, a document produced by ZoCo Defendants in this case, and Bates-stamped ZoCo.1.002755-59 [Confidential].

81. Attached as **Exhibit SSS** hereto is a true and correct copy of an April 6, 2017 email from M. Shen to T. Flaherty, a document produced by ZoCo Defendants in this case, and Bates-stamped ZoCo.1.000717 [Confidential].

82. A Google search for “Dr. Oz” and “miracle pill” I ran on May 22, 2018 returned 733,000 results.

83. I declare under penalty of perjury and the laws of the United States of America that the foregoing is true and correct.

Date: May 29, 2018

By: 

M. Kelly Tillery

(Admitted *Pro Hac Vice*)

PEPPER HAMILTON LLP

3000 Two Logan Square

Eighteenth & Arch Streets

Philadelphia, PA 19103-2799

P: (215) 981-4000

F: (215) 981-4750

tilleryk@pepperlaw.com

Kenneth J. King

PEPPER HAMILTON LLP

The New York Times Building

620 Eighth Avenue, 37th Floor

New York, NY 10018-1405

P: 212.808.2703

F: 212.286.9806 (fax)

kingk@pepperlaw.com

Adam B. Fischer

(Admitted *Pro Hac Vice*)

PEPPER HAMILTON LLP

500 Grant Street, Suite 5000

Pittsburgh, PA 15219

P: 412.454.5000

F: 412.281.0717 (fax)

fischeab@pepperlaw.com

*Attorneys for Plaintiff,
GOLO, LLC*